



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/827,309	04/20/2004	Michael B. Zemel	31894-199326	2567

26694 7590 09/05/2008
VENABLE LLP
P.O. BOX 34385
WASHINGTON, DC 20043-9998

EXAMINER

LASTRA, DANIEL

ART UNIT	PAPER NUMBER
----------	--------------

3688

MAIL DATE	DELIVERY MODE
-----------	---------------

09/05/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/827,309	Applicant(s) ZEMEL ET AL.	
	Examiner DANIEL LASTRA	Art Unit 3688	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 June 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3, 5-24 and 26-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 5-24 and 26-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. Claims 1-3, 5-24 and 26-30 have been examined. Application 10/827,309 (METHODS OF PROMOTING CALCIUM CONSUMPTION FOR WEIGHT LOSS) has a filing date 04/20/2004 and is a division of 10066057 01/31/2002 is a division of 09654357 09/01/2000.

Response to Amendment

2. In response to Non Final Rejection filed 10/16/2007, the Applicant filed a Request for Reconsideration on 06/20/2008.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 5-20, 22-24 and 26-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Study: Calcium May Curb Weigh Gain in Young Women (<http://www.sciencedaily.com/releases/1999/04/990421073608.htm>) in view of The Milk Mustache Campaign (<http://agcommcase.ifas.ufl.edu/mustache.html>).

As per claim 1, Calcium May Curb Weigh Gain teaches:

A method of inducing consumption of calcium-containing products for weight loss in an individual in need thereof comprising communicating to a potential consumer suffering from obesity that in combination:

Art Unit: 3688

a) consuming dietary calcium in an amount that is above suboptimal, over a period of time from a calcium-containing product (see paragraph 4), and

b) maintaining a restricted caloric diet below ad lib in a range that is about 200 kcal to about 2500 kcal per day, during that period of time (see paragraph 4),

has a beneficial effect on body weight or body fat from the consumption of the dietary calcium from the calcium-containing product, the effect selected from the group consisting of inducing weight loss, reducing weight gain, and/or increasing the metabolic consumption of adipose tissue in the individual (see paragraph 4)

Calcium May Curb Weigh Gain fails to teach:

the communicating being by an entity having a commercial interest in the consumption of the product and wherein the communicating is by a method selected from the group consisting of verbal communication, pamphlet distribution, print media, audio tapes, magnetic media, digital media, audiovisual media, billboards, advertising, newspapers, magazines, direct mailings, radio, television, electronic mail, electronic media, banner ads, fiber optics, and information on a product package, insert or label or directly accompanying the product. However, The “Milk Mustache Campaign” teaches distributing information to potential consumer about milk and its benefits where said information is distributed via print advertisements (see paragraph 1-5). The “Milk Mustache Campaign” does not teach distributing information via electronic media, banner ads, and other methods of delivering promotions. However, Official Notice is taken that it is old and well known in the business art to advertise products using different communications method, such as verbal, e-mails, etc. It would have been

Art Unit: 3688

obvious to a person of ordinary skill in the art at the time the application was made, to know that manufacturers and retailers of calcium-fortified products would use all the available and affordable means to advertise to consumers the benefit of said products, so said consumers are aware of said benefits and purchase said products. Therefore, it would have been obvious to a person of ordinary skill in the art at the time the application was made, to know that any entity having a financial interest in the sale of dairy products or dietary supplements would be motivated to distribute information to potential consumers about milk and its benefits to health, as taught by The "Milk Mustache Campaign" in order to promote the consumption of dairy products by claiming that the consumption of said products would have a benefit against osteoporosis (see The Milk Mustache paragraph 1) and obesity, as taught by Calcium May Curb Weight Gain. Retailers of calcium-fortified products would be motivated to advertise the benefits of said products in combating diseases and/or maladies, such as osteoporosis and/or obesity, as said advertise benefits would bring more business to said retailers.

As per claim 22, Calcium May Curb Weight Gain teaches:

A method for inducing the consumption of dairy products for weight loss in an individual in need thereof by a commercial entity having a financial interest in the sale of the products, wherein the entity distributes information to potential consumers of the dairy products describing weight-control benefits of dairy products attributable to the combination of:

a) the consumption of at least about 57 servings of dairy per month (see paragraphs 4, 5). Official Notice is taken that it is old and well known that a cup of milk

Art Unit: 3688

contains about 300 mg of calcium, therefore a consumption between 780mg to 1000mg of calcium a day would be construed to add to 57 of servings a month.

b) maintaining a restricted caloric diet below ad lib in a range of about 200 kcal to about 2500 kcal per day (see paragraphs 4, 5),

wherein the weight control benefits of consuming dairy are selected from the group consisting of inducing weight loss, reducing weigh gain, and/or increasing the metabolic consumption of adipose tissue in the individual (see paragraphs 4, 5), and

Calcium May Curb Weigh Gain fails to teach:

wherein the information is distributed by a method selected from the group consisting of verbal communication, pamphlet distribution, print media, audio tapes, magnetic media, digital media, audiovisual media, billboards, advertising, newspapers, magazines, direct mailings, radio, television, electronic mail, electronic media, banner ads, fiber optics, and information on a product package, insert or label or directly accompanying the product. However, the same rejection applied to claim 1 regarding this missing limitation is also applied to claim 22.

As per claim 24, Calcium May Curb Weigh Gain teaches:

A method for inducing consumption of calcium-containing products for weight loss in an individual in need thereof comprising promoting to a potential consumer the consumption of the calcium-containing-product comprising the public distribution of information describing obesity-control benefits attained from:

Art Unit: 3688

a) consuming greater than suboptimal amounts of dietary calcium in an amount of at least about 773 mg per day on average during a period of time (see paragraphs 4, 5), while

b) maintaining a restricted caloric diet below ad lib in a range of from about 200 kcal to about 2500 kcal per day (see paragraphs 4, 5),

wherein the obesity-control benefits of said product are attributable to the consumption of above suboptimal amounts of calcium in said product for inducing weight loss, reducing weight gain, and/or increasing the metabolic consumption of adipose tissue in the individual (see paragraphs 4, 5) and

Calcium May Curb Weigh Gain fails to teach:

wherein said distribution of said information is achieved by a method selected from the group consisting of verbal communication, pamphlet distribution, print media, audio tapes, magnetic media, digital media, audiovisual media, billboards, advertising, newspapers, magazines, direct mailings, radio, television, electronic mail, Braille, electronic media, banner ads, fiber optics, laser light shows and information on a product package, insert or label or directly accompanying the product. However, the same rejection applied to claim 1 regarding this missing limitation is also applied to claim 24.

As per claim 2, Calcium May Curb Weigh Gain teaches:

wherein the communicating comprises providing information about suboptimal calcium consumption (see paragraph 10).

As per claim 3, Calcium May Curb Weigh Gain fails to teach:

Art Unit: 3688

communicating an effect of calcium consumption on osteoporosis. However, The Milk Mustache campaign teaches the benefit of calcium consumption on osteoporosis (see paragraph 1). Therefore, the same combination applied to claim 1 is also applied to claim 3.

As per claim 5, Calcium May Curb Weigh Gain teaches:

wherein the effect on body weight comprises preventing or reducing obesity (see paragraphs 4, 5).

As per claim 6, Calcium May Curb Weigh Gain teaches:

wherein the effect on body weight comprises preventing or reducing weight gain (see paragraphs 4, 5).

As per claim 7, Calcium May Curb Weigh Gain teaches:

wherein the effect on body weight comprises weight loss (see paragraphs 4, 5).

As per claim 8, Calcium May Curb Weigh Gain teaches:

wherein the effect on body weight comprises inducing a weight-related metabolic change in an individual (see paragraphs 4, 5).

As per claim 9, Calcium May Curb Weigh Gain teaches:

communicating the effects of dietary calcium in inducing a metabolic change selected from the group consisting of decreasing intracellular calcium concentrations ([Ca²⁺]_i), stimulating lipolysis, inhibiting lipogenesis, increasing the expression of white adipose tissue uncoupling protein 2 (UCP2), reducing serum insulin levels, thermogenesis, or decreasing the levels of calcitrophic hormones (see paragraphs 4, 5).

As per claim 10, Calcium May Curb Weigh Gain teaches:

Art Unit: 3688

wherein the effect on body weight comprises preventing or reducing weight gain and/or adiposity in children (see paragraphs 4, 5). It would have been obvious to a person of ordinary skill in the art at the time the application was made, to know that children would have the same obesity benefit obtained by adults from the consumption of calcium as children are like small adults.

As per claim 11, Calcium May Curb Weigh Gain teaches:

wherein the communication pertains to a class of products to which the calcium-containing product belongs (see paragraphs 8, 9).

As per claim 12, Calcium May Curb Weigh Gain teaches:

wherein the product is a dairy product (see paragraph 8).

As per claim 13, Calcium May Curb Weigh Gain teaches:

wherein the product is a dietary supplement (see paragraph 8).

As per claim 14, Calcium May Curb Weigh Gain teaches:

wherein the product is a non-dairy foodstuff naturally high in calcium (see paragraphs 8, 9).

As per claim 15, Calcium May Curb Weigh Gain teaches:

wherein the product is a foodstuff fortified with calcium (see paragraph 8).

As per claim 16, Calcium May Curb Weigh Gain teaches:

wherein the product is selected from the group consisting of milk, yogurt and cheeses (see paragraph 8).

As per claim 17, Calcium May Curb Weigh Gain teaches:

wherein the product is a liquid supplemented with calcium (see paragraph 8).

Art Unit: 3688

As per claim 18, Calcium May Curb Weigh Gain fails to teach:

wherein the entity is the manufacturer of the product. However, The Milk Mustache campaign teaches communicating information by a milk processors of California about milk and its benefit to health (see paragraph 5). Therefore, the same combination made in claim 1 is also made in claim 18.

As per claim 19, Calcium May Curb Weigh Gain fails to teach:

wherein the entity is a retailer of the product. However, The Milk Mustache campaign teaches communicating information by a milk processors of California about milk and its benefit to health (see paragraph 5). Therefore, the same combination made in claim 1 is also made in claim 19.

As per claim 20, Calcium May Curb Weigh Gain fails to teach:

wherein the entity is a trade association whose members sell the product. However, The Milk Mustache campaign teaches communicating information by a milk processors of California about milk and its benefit to health (see paragraph 5). Therefore, the same combination made in claim 1 is also made in claim 20.

As per claim 23, Calcium May Curb Weigh Gain fails to teach:

wherein the distributed information recommends at least about 102 servings of dairy per month. However, The Milk Mustache campaign teaches communicating information about milk and its benefit to health where the entities that communicate the information are the Milk processors in California (see paragraph 5). Therefore, it would have been obvious to a person of ordinary skill in the art at the time the application was made, to know that any entity having a financial interest in the sale of dairy products or

Art Unit: 3688

dietary supplements would be motivated to distribute information to potential consumers about milk and its benefits to health, as taught by The “Milk Mustache Campaign” in order to promote the consumption of dairy products by claiming that the consumption of said products would have a benefit against osteoporosis (see The Milk Mustache paragraph 1) and obesity, as taught by Calcium May Curb Weight Gain. Retailers of calcium-fortified products would be motivated to advertise the benefits of said products such as consuming at least 102 serving of dairy products per month in order to sell more of said products.

As per claim 26, Calcium May Curb Weight Gain teaches:

wherein said information pertains to a class of products to which said calcium-containing product belongs (see paragraphs 8, 9).

As per claim 27, Calcium May Curb Weight Gain teaches:

wherein said class of products is dairy products (see paragraph 8).

As per claim 28, Calcium May Curb Weight Gain teaches:

wherein the communication recommends consuming calcium daily in an amount of at least about 773 mg (see paragraphs 4, 5).

As per claim 29, Calcium May Curb Weight Gain teaches:

wherein the communication recommends consuming calcium daily in an amount of at least about 1000 mg (see paragraph 5).

As per claim 30, Calcium May Curb Weight Gain teaches:

wherein the communication recommends consuming calcium daily in an amount of at least about 1,346 mg (see paragraph 5).

Art Unit: 3688

4. Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Study: Calcium May Curb Weigh Gain in Young Women (<http://www.sciencedaily.com/releases/1999/04/990421073608.htm>) in view of The Milk Mustache Campaign (agcommcase.ifas.ufl.edu/mustache.html) and further in view of Christiansen (US 6,159,530).

As per claim 21, Calcium May Curb Weigh Gain fails to teach:

wherein the product is identified by a trademark. However, Christiansen teaches a trademark calcium-fortified product (see Christiansen column 9, lines 20-35; "Calcium taste free"). Therefore, it would have been obvious to a person of ordinary skill in the art at the time the application was made, to know that Calcium May Curb Weigh Gain would be motivated to trademark his supplement in order to distinguish his products from others in the market.

Response to Arguments

5. Applicant's arguments filed 06/20/2008 have been fully considered but they are not persuasive. The Applicant argues that in Science daily did not restrict subjects' caloric intakes. The Examiner answers that Science Daily teaches in paragraph 4 restricting caloric intake to less than 1,900 calories. Therefore, contrary to Applicant's argument, Science Daily teaches Applicant's claimed limitation.

The Applicant argues that Science Daily does not teach beneficial effect on body weight from the combination of a restricted caloric intake and consuming dietary calcium. The Examiner answers that Science Daily teaches in paragraph 4 the effect of consuming less than 1,900 calories (i.e. restricted caloric intake) and at least 780mg

Art Unit: 3688

calcium on body weight. Therefore, contrary to Applicant's argument, Science Daily teaches Applicant's claimed limitation.

The Applicant argues that the study in Science Daily does not disclose that calcium has any effect in obese individuals. The Examiner answers that Science Daily teaches in paragraph 4 that averaging less than 780mg of calcium in comparison of an intake of calcium of at least 780 mg with a restricted caloric intake of 1,900 calories per day has an effect in body fat mass. Therefore, contrary to Applicant's argument, Science Daily teaches Applicant's claimed limitation.

The Applicant argues that the study in Science Daily focused in woman aged 18-31 and is gender bias. The Examiner answers that the Applicant is arguing about limitation not stated in the claims.

The Applicant that Science Daily is not an enabling disclosure. The Examiner answers teaches that Science Daily teaches that it is old and well known to research the effect of calcium and caloric intake in people. Therefore, contrary to Applicant's argument, Science Daily is enabling.

The Applicant argues that Tabbitta leads away from the teaching of the claimed invention. The Examiner answers that Tabbitta teaches promoting the benefit of milk. Therefore, contrary to Applicant's argument, Tabbitta does not teach away from Applicant's claimed invention.

The Applicant argues that Tabbitta does not teach methods for inducing the consumption of calcium products or dairy for weight loss. The Examiner answers that that Science Daily was used to teach said limitation.

Conclusion

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DANIEL LASTRA whose telephone number is 571-272-6720 and fax 571-273-6720. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James W. Myhre can be reached on (571)272-6722. The official Fax number is 571-273-8300.

Art Unit: 3688

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/DANIEL LASTRA/

Art Unit 3688

September 3, 2008